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No. 1078

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Supreme Court of the United States

OCTOBER TERM, 1966

THE BORDEN COMPANY, *Petitioner,*

v.

ORVILLE L. FREEMAN, *et al., Respondents,*

and

CAMPBELL SOUP COMPANY, *Intervenor-Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR CAMPBELL SOUP COMPANY IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR CAMPBELL SOUP COMPANY IN OPPOSITION

Campbell Soup Company ("Campbell"), intervenor-respondent, opposes the petition by The Borden Company ("Borden") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 29, 1966. The petition raises no important or novel federal question which should be decided by this Court.

STATUTES INVOLVED

The statutes principally involved are the Poultry Products Inspection Act ("PPIA"), 71 Stat. 441 (1957), *as amended,* 21 U.S.C. §§ 451-69 (1964), and the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001 *et seq.* (1964).[1] Pertinent provisions of these statutes, in addition to those printed in Appendix A to the petition for certiorari, are set forth in Appendix A, *infra,* pp. A1-A4.

QUESTIONS PRESENTED

Campbell believes that the following questions are presented:

1. Whether a federal question of substance is presented by the holding of the court of appeals and the district court that the Secretary of Agriculture ("Secretary") had authority under the Poultry Products Inspection Act ("PPIA") to promulgate the amended regulations here challenged.

2. Whether a federal question of substance is presented by the holding of the court of appeals that the district court correctly limited its scope of review to a determination, on the basis of the record filed with it by the Secretary, of whether the Secretary's promulgation of the challenged amended regulations was

[1] Public Law No. 89-554, 80 Stat. 378 (1966), enacted Title 5 of the United States Code into positive law. The sections of the former Administrative Procedure Act have been rewritten and scattered throughout Title 5. Since both the administrative action and judicial review were accomplished under the provisions of the former Administrative Procedure Act, and since there has been no change of substance which would affect any issue in this case, all references in this brief shall be to the former Administrative Procedure Act.

"arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law".

3. Whether any federal question of substance is presented by the holding of the court of appeals that the district court correctly determined to dispose of the case on summary judgment on the basis of the administrative record filed with the district court by the Secretary.

4. Whether a federal question of substance is presented by the holding of the court of appeals that the district court correctly decided that the Secretary's regulations were not arbitrary or capricious and, even if the "substantial evidence" test applied, were in fact supported by substantial evidence.

STATEMENT

Petitioner brought this action for a declaratory judgment that certain amendments to sections 81.134 and 81.208 of the Regulations of the United States Department of Agriculture ("USDA") are invalid insofar as they apply to petitioner's dehydrated soup mix products containing poultry ingredients, and for an injunction restraining the governmental respondents from enforcing the amended regulations against petitioner.[2] These amended regulations are set forth in Appendix B to the petition for certiorari, pp. 12a-20a. Campbell was permitted to intervene as a de-

[2] Petitioner has apparently dropped its contention that the Secretary had no power under the PPIA to adopt conditional exemptions from the Act, as in the amended section 81.208(a). There can be no doubt of the Secretary's power to adopt such exemptions, in view of section 4(e) of the PPIA, 21 U.S.C. § 453(e). See Opinion of the district court, Petitioner's Appendix A, pp. 33a-37a.

fendant in the district court by order of that court dated September 30, 1965. (R. 659.)[3]

Previous Regulatory Efforts Under the PPIA

Although enacted in 1957, the PPIA did not come into effect until January 1, 1959. Pub. L. No. 85-172, § 22, 71 Stat. 449 (1957). On the effective date, however, the USDA, acting under section 15(a)(3) of the Act, 21 U.S.C. § 464(a)(3), exempted all "further processing" operations, including the manufacture of poultry soups, from the Act until July 1, 1960. (R. 184-85.)[4] Effective in September 1959, the USDA added a new section 81.208 to its regulations under the PPIA. 24 Fed. Reg. 6833 (Aug. 22, 1959). Under this section, soup products (including dehydrated soups) containing "less than 2 percent cooked poultry meat" were exempted from classification as "poultry products" under the PPIA, provided that federally inspected meat was used. The "kind name" (such as "chicken" or "turkey") was not to be used in the product name of exempted products, because they were not "poultry products."

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[3] Throughout this brief, Campbell shall follow the citation system adopted in the petition for certiorari. Record references are to pages in the Joint Appendix filed in the court of appeals and transmitted to this Court. Like petitioner, Campbell has deleted the letter "a" from references to pages of the Joint Appendix.

[4] The USDA's approval of petitioner's labels on February 24, 1959 (R. 25, 26), which is mentioned on page 5 of the petition for certiorari, is thus without any probative value in this case. It is quite likely that the USDA approved petitioner's labels pursuant to the voluntary inspection program under the Agricultural Marketing Act of 1946, § 203(h), 60 Stat. 1087, *as amended*, 7 U.S.C. § 1622(h)(1964). (R. 123, 137-40.)

The USDA intended that the 2 per cent poultry meat specified for soups in section 81.208 be computed on a ready-to-serve basis. (R. 122, 185, 191.) When the USDA reached soups around the early part of 1961 in its item-by-item review of "further processing" operations (R. 124), it received objections to its computation of the poultry meat content of soups on a ready-to-serve basis. (R. 122.) The USDA answered these objections and reaffirmed its interpretation of section 81.208 in an authoritative letter to the industry and USDA officials, dated May 19, 1961. (Complaint Ex. E; R. 27-28, 123.)

Even though the 2 per cent poultry meat standard appeared in an exemption provision, it was also intended to be a labeling standard. (R. 206.) The Department's May 19, 1961 letter indicated that "[s]ome adjustments in labeling will probably be necessary" in the case of soups and dehydrated soup mixes that did not meet the 2 per cent standard and which would be eligible for inspection only under the voluntary inspection program.[5]

During this period of uncertainty in 1960 and 1961, Campbell, a manufacturer of prepared foods including poultry soups, and other manufacturers of poultry soups were required by the USDA to increase the meat content of some of their poultry soups in order to obtain approval of their labels, which bore the "kind" name, *i.e.*, "chicken" or "turkey." (R. 335-36, 387-89.) Moreover, when Campbell introduced its line of consumer dried soup mixes in 1961, it was told

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[5] Prior to the PPIA, voluntary inspection of poultry products was available under the Agricultural Marketing Act of 1946. See p. 4, n. 4, *supra*.

by the USDA and the Food and Drug Administration ("FDA") that regulations would soon be promulgated effectively enforcing the minimum meat content standard of 2 per cent on a ready-to-serve basis. Accordingly, Campbell labeled its new under-2 per cent dehydrated soup "Noodle Soup with Real Chicken Stock"—a product comparable to petitioner's "Wyler's Chicken Noodle Soup Mix"—and reserved use of the unqualified "kind" name to its above-2 per cent product. (R. 343, 346-47.)

In June 1961, the USDA proposed to amend its regulations under the PPIA in order to "eliminate misunderstanding concerning the amount of poultry meat that can be included in certain food products without requiring them to be inspected under the Act." 26 Fed. Reg. 5958 (July 1, 1961). Accordingly, in September 1961, the USDA added a new paragraph (c) to section 81.134, requiring that soups, soup mixes, and soup bases labeled with the "kind" name contain not less than 2 per cent cooked poultry meat on a ready-to-serve basis. The exemption section, § 81.208, was also amended to state clearly that the poultry meat content of soup products must be computed on the ready-to-serve (or reconstituted) basis. 26 Fed. Reg. 8559-60 (Sept. 13, 1961). In promulgating these amendments, the USDA recited that it found the requirement of 2 per cent poultry meat on the ready-to-serve basis to represent "historical average trade practices and consumer expectancy." (26 Fed. Reg. 8560.)

The period of regulatory transition and uncertainty should have ended with promulgation of the 1961 amendments. However, a number of "interested parties" objected to the flat prohibition in section 81.208 against use of the kind name on products not meet-

ing the 2 per cent standard. The USDA agreed that that section could be interpreted to exclude even the qualified use of the kind name (such as "chicken-flavored") on products not meeting the standard but characterized by a poultry flavor. (R. 153.)

The USDA decided to cure this ambiguity by revoking the 1961 amendments of sections 81.134 and 81.208 before they became effective. Accordingly, the Department dropped its addition to section 81.134 and simply amended section 81.208 to provide that any food product (including soups and soup mixes) would be exempted from classification as a "poultry product" under the Act provided, *inter alia,* (1) that it was made from federally inspected meat, and (2) that it contained less than 2 per cent poultry meat computed on the ready-to-serve basis. 27 Fed. Reg. 8097-98 (Aug. 15, 1962) (Complaint Ex. I; R. 44, 47-48). Jurisdiction as to the labeling of exempted products was to rest with the FDA. 27 Fed. Reg. 5562 (June 12, 1962).[6] This new version of section 81.208 went into effect on March 1, 1963, and has remained in effect ever since because of the pendency of this action, including the present petition. See 32 Fed. Reg. 2442-43 (Feb. 4, 1967).

Unfortunately, the FDA maintained that the USDA retained exclusive jurisdiction[7] over these supposedly exempted products because of the requirement that the

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[6] The same is true under the 1964 amendments here challenged by petitioner, except that the conditions for exemption from the PPIA have been changed. (R. 151-55.) Of course, certain defects in the labels of under-2 per cent products will cause them to lose their exemptions.

[7] See PPIA § 18(a), 21 U.S.C. § 467(a).

meat used in such products be federally inspected (*i.e.*, subject to USDA inspection). (R. 224-25, 343-44, 471.) Moreover, the FDA informed representatives of Campbell in 1963 that it could not effectively regulate the labeling of soup products exempted by section 81.208 because of the lack of a clear labeling standard; in the FDA's view, it was up to the USDA to establish such a standard. (Doc. 63-7; R. 525-27.)[8]

Promulgation of the Challenged Amended Regulations

This regulatory impasse between the USDA and the FDA had the practical effect of leaving the labeling of soup products containing less than 2 per cent poultry meat on a ready-to-serve basis completely unregulated. Thus, quite contrary to USDA intention, products which were not "poultry products," such as petitioner's "Wyler's Chicken Noodle Soup Mix," were placed on supermarket shelves under the same unqualified kind names (*i.e.*, "chicken" or "turkey") as poultry soup products meeting the 2 per cent standard. Soup products meeting the 2 per cent standard were obviously far more expensive than those competing products which did not. (R. 237-38.) It was this unfairness to consumers and competing soup manufacturers, quite unintended by the USDA, which prompted Campbell to request that some action be taken to break the regulatory impasse between the USDA and the FDA. (Doc. 63-7; R. 525-57.)

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[8] The term "Doc." is used to refer to documents filed by the USDA in the district court as part of the administrative record, but which were not offered as exhibits at the oral hearing held by the USDA. The first part of the number (*e.g.*, "63") refers to the year file in which the document was submitted to the court by the USDA.

In October 1963, the USDA initiated the rulemaking proceeding which eventually led to promulgation of the challenged amended regulations. 28 Fed. Reg. 11,017-18 (Oct. 15, 1963) (Complaint Ex. K, R. 53-61). It proposed to break the administrative deadlock by amending section 81.134 of its regulations to provide (1) that the meat content of consumer packaged poultry soups be calculated on a ready-to-serve basis and (2) that products similar to poultry soups, but containing less than the required 2 per cent poultry meat, may use the "kind" name on the label only if the name is "appropriately qualified to distinguish such products from those containing the specified minimum meat content". Written comments and relevant data were invited, and the USDA stated that it was willing to receive requests for an oral hearing.

It was soon apparent, however, that the proposed amendment to section 81.134, without more, would not eliminate the regulatory gap. The FDA informed representatives of Campbell that it would still not be able to undertake effective regulation of the labeling of soup products containing less than 2 per cent meat on a ready-to-serve basis. (R. 352.) Accordingly, Campbell proposed that the exemption section (§ 81.208) be amended to provide clearly for USDA jurisdiction over the labeling of certain under-2 per cent soup products. (Ex. 20; R. 353, 500-04.)[9] This proposal, as well as an alternative proposed amendment to section 81.208, was published in the Federal Register as part of the rulemaking proceeding initiated on October 15, 1963. 29 Fed. Reg. 2892 (Feb. 29, 1964) (Complaint Ex. N; R. 76-79). The alternative suggested by Campbell

[9] The term "Ex." is used to refer to exhibits introduced in the course of the oral hearing held by the USDA in March 1964.

would have required, in pertinent part, (1) that exempted products use only federally inspected meat or its equivalent; (2) that the exempted products contain less than 2 per cent poultry meat on a ready-to-serve basis; and (3) that an exempted product not use the kind name (such as chicken or turkey) in the product name. According to the USDA, this proposal would have left the USDA responsible "for regulating the labeling as to the product name and the poultry meat content of the otherwise exempted products." (R. 77.)[10]

The second proposed alternative amendment would have (1) removed the requirement that federally inspected meat be used in exempted products (including soups) and (2) exempted any product containing less than 10 per cent cooked poultry skins, giblets, fat or meat and less than 2 per cent poultry meat on the ready-to-serve basis. Nonuse of the kind name was not included as a condition for exemption. In the view of the USDA, this proposed amendment would transfer complete regulatory authority over exempted products as to both labeling and wholesomeness to the FDA. (R. 78.)

As permitted (although not required) by section 4(b) of the Administrative Procedure Act,[11] the USDA permitted interested persons to submit their views and arguments orally at a public hearing held on March 23-25, 1964. The contentions of the various interested parties, including petitioner, were explored in detail in the testimony and exhibits offered at the hearing. Counsel for petitioner not only was permitted to sub-

[10] Exempted products are not subject to inspection under the PPIA.

[11] 5 U.S.C. § 1003(b) (1964).

mit petitioner's own case, but was allowed to engage in wide-ranging cross-examination of witnesses tendered by parties whose views conflicted with those of petitioner. Counsel for petitioner was also permitted to examine an official of the USDA in great detail.

The evidence adduced at the hearing and the various written comments filed by interested persons in the course of the rulemaking proceeding, including comments by Mrs. Esther Peterson, then Special Assistant to the President for Consumer Affairs, and prominent home economists,[12] amply supported the USDA's promulgation of the challenged amended regulations. In the Statement of Considerations which accompanied the challenged amended regulations, the USDA made the following key findings, each amply supported by the record: (1) that it was necessary to establish a minimum poultry meat content standard for labeling purposes applicable to poultry soups;[13] (2) that all types of soups, whether liquid, condensed, dehydrated, or frozen, constitute a single product category and should be treated alike in the establishment and enforcement of labeling standards;[14] (3) that the minimum poultry meat content standard for poultry soups should be established at 2 per cent on the ready-to-serve basis;[15] (4) that the scheme of conditional exemp-

[12] Docs. 64-10, 64-11, 64-12, 64-14, 64-15, 64-16; R. 540-41, 544-55.

[13] See, *e.g.*, R. 216, 217, 219, 224, 300-02, 339, 471-72; Docs. 64-10, 64-11, 64-12, 64-14, 64-15, 64-16, R. 540-41, 544-55. See also, R. 116-17, 129-30 (court depositions of USDA officials).

[14] See, *e.g.*, R. 201, 219, 229-30, 314, 329, 336-37, 410, 438-39, 445-46, 451, 471-72; the "Docs." cited in n. 13, *supra*.

[15] See, *e.g.*, R. 186-87, 219, 223, 302, 304, 311-12, 315, 329, 335-36, 341-42, 450, 453-56; Doc. 59-2, R. 516; Doc. 63-11, R. 529; Doc. 64-4, R. 538-39. Doc. 59-2 is especially significant.

tion adopted in the amended section 81.208 was necessary and workable.[16] 29 Fed. Reg. 8456-59 (July 7, 1964) (Complaint Ex. R, R. 89-106).

In reaching these conclusions, the USDA pointed out that over 90 per cent of all soups which consumers buy, including one-third of consumer-purchased dehydrated soups, already met the 2 per cent standard. (R. 93-94.) The Department also rightly ignored the alleged fact that it would have been technologically impossible to manufacture dehydrated soups containing at least 2 per cent poultry meat on a ready-to-serve basis prior to 1961.[17] The amended regulations in no way prohibit anyone from manufacturing and selling soups not meeting the 2 per cent standard, provided they are properly labeled. (R. 95-96.) Finally, the USDA carefully considered the evidence offered by petitioner and other opponents of the amended regulations and found such evidence inadequate. (R. 94-95.) For example, 27 per cent of the members of a taste panel could not even identify petitioner's dehydrated soup as any kind of "chicken soup." (R. 95, 250-52, 271.)

The Prior Proceedings in This Action

Petitioner filed this action on September 21, 1964, prior to the scheduled January 1, 1965 effective date of the amended regulations. A preliminary injunction against enforcement of the regulations was granted in December 1964 and filed in January 1965. (R. 1.) Campbell was permitted to intervene as a defendant on September 30, 1965. (R. 659.) On June 10, 1966, the

[16] See, *e.g.*, R. 219, 221-22, 224-25, 337, 341, 342-45, 416-19, 436, 448-50, 451-52, 455, 456-57, 471-74.

[17] See petition for certiorari, p. 6.

district court issued its opinion. (256 F. Supp. 592; Petition Appendix D, p. 25a; R. 660-78.) The district court held: (1) that the Secretary was authorized under the PPIA to promulgate quasi-legislative standards of identity for poultry products and to exempt products conditionally from the Act; (2) that the court's review was limited to a determination, on the basis of the administrative record filed by the Secretary, of whether the promulgation of the regulations was arbitrary or capricious; and (3) that the challenged amended regulations met the test of reasonableness and were not arbitrary or capricious or otherwise unlawful. The district court also found, alternatively, that even if the "substantial evidence" test applied, the Secretary's action in promulgating the amended regulations was supported by substantial evidence. (R. 678.)

On July 14, 1966, the district court entered its order and judgment granting respondents' motion for summary judgment, vacating the preliminary injunction, and dismissing petitioner's complaint. (Petition Appendix E, p. 44a; R. 679.)

After granting an expedited appeal, the United States Court of Appeals for the Third Circuit, per curiam, affirmed the district court's order and judgment "on the well-reasoned opinion of Judge Lane". (Petition Appendix F, p. 45a.) Thus the court of appeals, like the district court, also determined after its review of the record that the Secretary's amended regulations were supported by substantial evidence.

ARGUMENT

I. The Courts Below Correctly Determined That the USDA Had Power Under the PPIA To Adopt the Challenged Amended Regulations, and Further Review Is Not Warranted.

Under section 14 of the PPIA, 21 U.S.C. § 463, the Secretary is directed to promulgate "such rules and regulations as are necessary to carry out the provisions of this chapter." Two of those provisions are sections 8(b) and 9(d), which prohibit the sale or offer for sale of any poultry product under any false or deceptive name or the use of a false or misleading label on any such product. Soup products containing *any* poultry ingredients are "poultry products" under the Act, unless specifically exempted by the Secretary. § 4(e), 21 U.S.C. § 453(e). These provisions of the Act, taken together, fully empowered the Secretary to adopt the challenged amended regulations.

Under the very similar statutory scheme of the Meat Inspection Act, upon which the PPIA was modeled,[18] this Court squarely upheld the power of the Secretary to promulgate standards of identity for labeling purposes. *Houston* v. *St. Louis Independent Packing Co.*, 249 U.S. 479 (1919). Petitioner's attempt to find a conflict with *Houston* in the present case (Petition pp. 12-13) must fail. Quite apart from the fact that *Houston* arrived in the courts in an entirely different procedural posture from the present case, it is apparent from examination of the lower court opinions in that case (1) that there is no indication that the Secre-

[18] See S. Rep. No. 195, 85th Cong. 1st Sess. 3 (1957); H.R. Rep. No. 465, 85th Cong. 1st Sess. 4 (1957); 103 Cong. Rec. 1644 (1957) (remarks of Senator Humphrey). The pertinent provisions of the Meat Inspection Act are presently found at 34 Stat. 1262, 1264 (1907), 21 U.S.C. §§ 75, 89 (1964).

tary held a full-dress, trial-type hearing (if he held any hearing at all) before he promulgated the regulations upon which he later relied in refusing to pass the specific products involved in *Houston,* and (2) that there was no "elaborate trial on the merits" in the district court on the issue of whether the labels involved in that case were false and deceptive. See *St. Louis Independent Packing Co.* v. *Houston,* 231 Fed. 779, 781, 783 (E.D. Mo. 1916); *St. Louis Independent Packing Co.* v. *Houston,* 242 Fed. 337, 346, 347, 348-49 (8th Cir. 1917) (dissenting opinion). Thus, this Court, which decided *Houston* long before passage of the Administrative Procedure Act, did not use the term "substantial evidence" in the technical sense in which it is used today, namely, significant evidence compiled in a formal record made at a formal hearing.

The inclusion in section 8(b) of the PPIA of adjudicatory procedure to be followed by the Secretary in evaluating particular labels does not mean that he is powerless to promulgate standards of identity through general policy rulemaking.[19] This Court has frequently upheld the power of federal agencies, acting under general rulemaking authority like that in section 14 of the PPIA, to prescribe, in advance of adjudicatory hearings guaranteed by statute, standards which would be applied, without reexamination, in subsequent adjudicatory proceedings. See *FPC* v. *Texaco, Inc.,* 377 U.S. 33 (1964); *United States* v. *Storer Broadcast-*

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[19] If petitioner's contention is that the Secretary in fact adjudicated against it and determined that its labels violated the statute (Petition p. 19), then petitioner should have sought judicial review in an appropriate court of appeals. PPIA § 8(b), 21 U.S.C. 457(b). This action, then, should be dismissed for lack of jurisdiction in the district court.

ing Co., 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). See also *American Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298 (1953); *Law Motor Freight, Inc.* v. *CAB*, 364 F. 2d 139 (1st Cir. 1966); *American Airlines* v. *CAB*, 359 F. 2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966); *Airline Pilots Ass'n* v. *Quesada*, 276 F. 2d 892 (2d Cir.), *cert. denied*, 366 U.S. 962 (1960). The fact that individuals or private companies were forced to alter or abandon long-standing profitable business arrangements in those cases did not invalidate the regulations. Nor does the fact that petitioner might be subjected to criminal penalties for violation of the challenged regulations affect the validity of the regulations. In any event, section 13 of the PPIA, 21 U.S.C. § 462, provides a mechanism for disposing of violations without criminal prosecution.

II. The Decision Below Is Not in Conflict With Prior Decisions of This Court.

1. The decision below is not in conflict with *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), or *Service* v. *Dulles*, 354 U.S. 363 (1957). In both of those cases, the agency head had promulgated legislative rules governing the procedure in certain adjudicatory proceedings. This Court held illegal personal action by the agency head in violation of those rules.

The present case involves, not adjudication, but general policy rulemaking. More importantly, the Secretary's delegation of authority to his subordinates, which is relied upon by petitioner (Petition p. 15) did not prescribe any legally binding procedure to be followed. In fact, the initial delegation by the Secretary, which

remained in effect through the various amendments and subdelegations, contained the following reservation of authority to the Secretary:

> "No delegation or authorization prescribed in this document shall preclude the Secretary from exercising any of the powers or functions or from performing any of the duties conferred herein and any such delegations or authorization is subject at all times to withdrawal or amendment by the Secretary. No delegation or authorization prescribed in this document shall preclude the exercise of any delegation or authorization otherwise provided to the Under Secretary, Assistant Secretaries, Administrative Assistant Secretary, or Assistant to the Secretary for Agricultural Credit, or to the Staff agencies as provided in section 112 hereof." 19 Fed. Reg. 74 (Jan. 6, 1954).

Thus, whatever evidence plaintiff might have offered in the district court about alleged interference by Mr. Grange's superiors in the promulgation of the challenged regulations was totally irrelevant and immaterial.

2. Similarly, the decision below is in no way in conflict with *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), or *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965). The principle stated by those cases and relied upon by petitioner (Petition pp. 16-18) was enunciated by this Court in reviewing agency adjudications, not agency general rulemaking. Indeed, in *Chenery*, this Court explicitly noted that the case before it would have been entirely different had the Commission promulgated a general rule applicable to the adjudicatory proceeding then being reviewed by the Court. 332 U.S. at 201-02. See also *SEC* v. *Chenery Corp.*, 318 U.S. 80, 92-94 (1943); *Burlington*

Truck Lines, Inc. v. *United States, supra* at 167-68. Moreover, each of these decisions is wholly distinguishable from the present case on its facts. In any event, neither the district court nor the court of appeals substituted post hoc rationalizations for the USDA's action. As noted, in addition to upholding the USDA's power to promulgate standards of identity, each of the courts below held that the Secretary's action in promulgating the regulations was supported by "substantial evidence."

III. The Procedures Followed by the Secretary and the Reviewing Courts Present No Substantial Questions of Federal Procedure Which Should Be Considered by This Court.

1. The Secretary complied fully with the requirements of the Administrative Procedure Act for rulemaking, and petitioner does not contend otherwise. There can be no doubt that the notices given by the USDA in the Federal Register fully complied with the requirements of section 4(a), 5 U.S.C. § 1003(a). It is clear that section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 1003(b), governed the rulemaking proceeding, rather than the provisions of sections 7 and 8 of that Act, since the Secretary is not required by the PPIA to make rules only "on the record after opportunity for an agency hearing." Not only did the USDA give all interested persons an opportunity to participate in the rulemaking proceeding through submission of written data, views, and arguments, but it went further and permitted them to present their views, data, and arguments orally. The oral hearing held on March 23-25, 1964, complied with section 4(b) of the Administrative Procedure Act, since the Secretary was authorized by that section to conduct such a hearing "in any manner." Finally, the USDA's

Statement of Considerations (Complaint Ex. R, R. 89-106) fully complied with the statutory requirement that "the agency . . . incorporate in any rules adopted a concise general statement of their basis and purpose."

2. Petitioner's argument (Petition pp. 18-23) that its petition raises substantial questions of federal procedure is founded entirely upon the erroneous premise that the USDA in fact took adjudicatory action against petitioner. The decisions of this Court relied upon by petitioner (Petition pp. 18-19) are thus not in point. *Morgan* v. *United States*, 298 U.S. 468 (1936), 304 U.S. 1 (1938), does not assist petitioner. Not only did that case involve ratemaking, which traditionally has always required a trial-type hearing, but the governing statute, unlike the PPIA, explicitly required a "full hearing" by the Secretary of Agriculture before he could fix new rates. 298 U.S. at 473. The other cases cited by petitioner so obviously involved administrative adjudication that no further comment is required.

The simple answer to petitioner's complaint (Petition pp. 19-20) that the Secretary relied upon "confidential" evidence is that the USDA gave petitioner, along with all other interested persons, their full rights under section 4(b) of the Administrative Procedure Act. Petitioner was not entitled to a trial-type hearing in connection with the rulemaking proceeding,[20] and it obtained more than the minimum required when the USDA held its oral hearing in the course of the rulemaking proceeding.

3. Petitioner's contention (Petition pp. 20-21) that it was entitled to a hearing before the district court is

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[20] See, *e.g.*, FPC v. Texaco, Inc., *supra*; United States v. Storer Broadcasting Co., *supra*; Law Motor Freight, Inc. v. CAB, *supra*; American Airlines v. CAB, *supra*.

similarly meritless. The fortuity that judicial review in the present case was in a district court instead of in a court of appeals gave petitioner no right to a judicial trial de novo. See *American Trucking Ass'ns, Inc.* v. *United States, supra; National Broadcasting Co.* v. *United States, supra; Noren* v. *Beck,* 199 F. Supp. 708 (S.D. Cal. 1961). Despite petitioner's apparent attempt to convey the impression that it desired only a limited judicial hearing, in fact its demand in the district court for a trial de novo was wide ranging and unspecific and reached all issues in the case as set forth in paragraphs 37-45 of petitioner's complaint. (R. 17-19, 648-49.) Moreover, the so-called "confidential" evidence referred to on page 20 of the petition for certiorari was included in the administrative record filed by the Secretary in the district court and made available to petitioner. Petitioner had ample opportunity to comment on such evidence in the many briefs it filed in the district court. Finally, despite the district court's ultimate disposition of the case on summary judgment, petitioner did take the depositions of two key USDA officials, including Deputy Administrator Grange, who actually promulgated the challenged regulations. (See R. 1, 107-59.) Thus petitioner received more than it was entitled to on judicial review.[21]

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[21] Jordan v. American Eagle Fire Ins. Co., 169 F. 2d 281 (D.C. Cir. 1948), is not in point. It involved ratemaking, in which a trial-type hearing at some level must be afforded to parties whose rates are fixed. Armour & Co. v. Freeman, 304 F. 2d 404 (D.C. Cir.), *cert. denied,* 370 U.S. 920 (1962), is inconclusive. In fact, a trial was never held in *Armour,* since the case was dismissed without prejudice shortly after certiorari was denied. Armour & Co. v. Freeman, Civil Action No. 3626-61 (D.D.C. July 12, 1962). The District of Columbia Circuit today would most likely refuse to grant petitioner a trial de novo. *Cf.* American Airlines v. CAB, *supra.*

4. The courts below correctly held that the scope of judicial review was limited to a determination of whether the USDA had acted arbitrarily or capriciously in promulgating the challenged regulations. This is plain on the face of the Administrative Procedure Act, §§ 4(b), 7, 8, 10(e)(B)(1), (5), 5 U.S.C. §§ 1003(b), 1006, 1007, 1009(e)(B)(1), (5). It is perfectly apparent from these sections that, not only was petitioner not entitled to a trial de novo, but also that the "substantial evidence" test was not applicable on judicial review.

5. The requirement that judicial review be based upon the "whole record," insofar as that requirement might apply in review of a rulemaking proceeding, was amply fulfilled in the present case. The USDA met its obligation of filing in the district court the record on which it had relied in promulgating the challenged regulations.

The examples of alleged "tailoring" of the record cited by petitioner (Petition pp. 21-22) are frivolous. The military specification mentioned by petitioner was initially injected into the case when an opponent of the amended regulations introduced at the hearing a specification dated 20 November 1957 and entitled "Dehydrated chicken soup, Type II, with noodles." (Ex. 19; R. 333.)[22] In the Statement of Considerations, the USDA simply noted that the 1957 specification had been superseded by one dated 20 June 1963 and entitled "Soup, Dehydrated, Chicken-Flavored." (Doc. 63-3; R. 94, 517.) The discrepancy between the cover

[22] Exhibit 19 was not printed in the Joint Appendix filed in the court of appeals, although it was included in the record transmitted to that court.

page of the 1963 specification and the labeling requirement in the text of the specification was obviously a simple oversight. This oversight has now been corrected by a revised specification dated 14 February 1966, portions of which are printed in Appendix B, *infra,* pp. A5-A6.[23] This latest specification requires that containers for the soup, which contains less than 2 per cent chicken meat on a ready-to-serve basis, be labeled "Soup, Dehydrated, Chicken-Flavored With Noodles." It should also be noted that the USDA did not request the military authorities to change the title of the specification in 1963, and there was no coordination between the USDA and the military concerning that change. (R. 149.)

Petitioner's second example of alleged tailoring of the administrative record (Petition p. 22) is similarly frivolous. Even petitioner admits that the USDA had in its files at the time the amended regulations were promulgated formulae for soups representing over 90 per cent of all consumer packaged soups sold. What petitioner ignores is the fact that the USDA recognized from its own experience over the years that most dehydrated soup mixes contain substantially below 2 per cent poultry meat on a ready-to-serve basis. (R. 187.) The 2 per cent meat content standard on a ready-to-serve basis appeared in the USDA regulations as early as 1959,[24] and, as petitioner admits, the USDA had formulae for the under-2 per cent soups in its files at least until March 1963, when they became exempt from the PPIA. Finally, the Department had avail-

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[23] This revised specification was printed in full in the Addendum to Campbell's brief filed in the court of appeals.

[24] See pp. 4-5, *supra.*

able to it Doc. 59-2 (R. 516) when it promulgated the challenged amended regulations. This document, an analysis of 23 noodle soups including condensed and dehydrated versions, revealed widely varying meat content for dehydrated soups, ranging from far below 2 per cent to above 3 per cent on a ready-to-serve basis.

CONCLUSION

The petition for certiorari does not raise any substantial federal question worthy of review by this Court. In view of the long and continuing lack of effective regulation of the labeling of soup products containing poultry ingredients, and in view of the fact that two courts have considered petitioner's contentions and have found them without merit, Campbell respectfully suggests that further delay in implementation of the challenged amended regulations promulgated over 2½ years ago is unwarranted. Campbell respectfully submits, therefore, that the petition for certiorari should be denied.

Respectfully submitted,

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